89-1791

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

October Term, 1989

JOHN LAMBORN,
Petitioner,

v.

STATE OF DELAWARE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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23

QUESTION PRESENTED

Does a jury instruction that contains a mandatory conclusive presumption that "a person found in possession of goods acquired as a result of a commission of a recent crime is presumed to have committed the crime" relating to a charge of Felony Theft constitute a violation of Defendant's right to Due Process under the United States Constitution, as applied to the States through the 14th Amendment to the United States Constitution, which requires reversal of his convictions.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Delaware entered in the above captioned case on February 20, 1990.

CITATION TO OPINION BELOW

The order of the Delaware Supreme Court, which is attached hereto as Appendix A.

JURISDICTION

The Delaware Supreme Court issued an opinion on February 20, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 19, 1977, an unidentified male broke into the house of Pauline Murray, raped her and took various personal belongings of the victim including her notary seal, along with some vials of coins and jewelry.

Defendant was arrested after police officers discovered certain items at the apartment of Rhonda Willis during

the execution of a search warrant of an unrelated case involving a convicted murderer escapee. The convict, Robert Martin, had escaped from the Department of Corrections on April 18, 1979, and police believed that Rhonda Willis, a friend of Robert Martin, may have aided him in the escape.

Defendant, John Lamborn spent the night of April 18, 1979 at the Willis residence—he slept on a couch in the livingroom. The stolen jewelry, coins and notary seal were found in the Willis livingroom during the course of the search on April 19, 1979 at approximately 6:00 pm. Willis explained that the items could have belonged to Lamborn since he had spent the previous night in the livingroom.

Willis testified that Lamborn showed her some jewelry on April 19, 1979, borrowed her car, and told her that he was going to Pennsylvania to sell it. The police detained Lamborn when he returned. The police searched the car and found assorted jewelry and a ski mask. Lamborn had coins and jewelry in his possession.

The victim never identified Lamborn as the attacker. She described her assailant as being approximately six feet tall, weighing between 160 and 180 pounds. She was unsure of his race and thought he may have been black. Lamborn is caucasian. The victim claimed that after the rape she was forced to take a shower, tied to a bed while the attacker took her property and left.

An agent of the Federal Bureau of Investigation testified that two hair fibers seized from the victim's shower catch drain shared fifteen similar characteristics with samples of Defendant's pubic hair. He acknowledged that he could not conclusively state that the seized pubic hairs were Lamborn's because hair analysis is not a positive

means of identification, unlike fingerprints. Moreover, there were numerous samples that did not resemble samples of either the victim or the Defendant.

At trial, the State relied to a large extent upon the Defendant's possession of allegedly stolen property, his Preliminary Hearing testimony explaining his possession of those items and two pubic hairs found at the victim's residence which were similar to samples from Lamborn. Absent from the State's case was any fingerprint evidence linking Lamborn to the victim's residence, victim identification of Lamborn as her assailant, evidence that the ski mask found in the car was the same as the stocking cap worn by the rapist, or any medical evidence that the victim had actually been raped.

Defendant did not call any witnesses in his defense but relied upon cross-examination of the State's witnesses, as well as the insufficiency of the circumstantial evidence presented by the State, to establish his innocence.

On March 10, 1980, a jury convicted John Steven Lamborn of first degree Rape, *(11 Del.C.* Sec.764) first degree Burglary (11 *Del.C.* Sec. 826) and felony Theft (11 *Del.C.* Sec. 841). The Defendant's convictions were affirmed on Appeal. *Lamborn v. State, Del. Supr., 450 A.2d 893 (1981).*

Defendant moved for Post Conviction Relief contending that he was denied his federal constitutional right to due process based upon a jury instruction on Possession of Recent Stolen Property which was defective in light of *Sandstrom v. Montana, 442 US 510 (1979).*

The Trial Court's instruction was as follows:

> There is a statute in the State that may have some bearing in this case if you make the requisite findings. I'll read to you some brief portions of the

> statute. A person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committed the crime. The Court may tell the jury of the existence of presumption, and if does so, the Defendant is entitled to a jury instruction that the presumption does not relieve the State of its burden of proving guilt beyond a reasonable doubt. Nevertheless, the jury may convict the Defendant despite the existence of evidence tending to rebut the presumption if they find no reasonable doubt about the Defendant's guilt.

The State conceded, and the Court found, that the jury instruction was constitutionally defective. The State also conceded that there was cause for the procedural default, but argued that Defendant did not suffer prejudice because of the alleged strength of its case against Lamborn. On August 31, 1988, the Superior Court granted the Defendant's Post Conviction Motion for a New Trial. The State filed a Motion for Reargument contending that no prejuduce existed under the harmless error standard of *Rose v. Clark, 478 US 570 (1986).* The Superior Court ultimately issued a new Order denying the Post Conviction Motion for a New Trial.

Defendant appealed the Superior Court's Order denying the Post-Conviction Motion for a New Trial to the Delaware State Supreme Court.

On February 20, 1990 the Supreme Court of the State of Delaware issued an Order affirming the decision of the lower Court (Appendix A). Lamborn seeks a Writ of Certiorari to the Supreme Court of the State of Delaware.

REASONS FOR GRANTING THE WRIT

I. This case presents an important question involving what manner of harmless error analysis is applicable in assessing a mandatory conclusive presumption contained within a jury instruction that violates a Defendant's due process rights under the Fifth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment to the United States Constitution.

In *Lamborn v. State, Del. Supr. 100, 1989, Moore, J (Feb. 20, 1990) (Order)* (Appendix A) the Delaware Supreme Court held that a jury instruction given at Defendant's trial was unconstitutional under *Sandstrom v. Montana, 442 US 510* (1979), but that no prejudice existed under the harmless error analysis of *Rose v. Clark, 478 US 570 (1986)*.

The Due Process Clause of the United States Constitution requires that in a criminal trial, the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re: Windship, 397 US 358 (1970)*. In *Sandstrom v. Montana, 442 US 510 (1979)*, the Supreme Court held that the Due Process clause was violated by a jury instruction that the law "presumes that a person intends the ordinary consequences of his voluntary act". The instruction was unconstitutional because a reasonable juror might have viewed it as creating a conclusive or burden shifting presumption on the issue.

The Court in *Sandstrom* expressly left open in the case whether the nature of the error can ever be harmless. *In Rose v. Clark 478 US 570 (582) (1986)* it was established that *Sandstrom* error must be scrutinized under the harmless error standard of *Chapman v. California, 384 US 18, 24 (1967)*.

Under *Chapman*, where a federal constitutional deprivation is involved, the government has the burden of proving the harmlessness of the error beyond a reasonable doubt. In determining whether the error was harmless, the question is not whether the accused is actually prejudiced, but whether there was "reasonable possibility that the evidence complained of might have contributed to the conviction." Stated in other words, the State has the burden to prove beyond a reasonable doubt that error complained of did not contribute to the verdict obtained.

In *Lamborn*, the Court found that the *Sandstrom* error was harmless because the record established guilt beyond a reasonable doubt. The Court's inquiry was misdirected, therefore, its conclusion is erroneous.

As recognized by Justice Scalia, the harmless error analysis applicable in assessing a mandatory conclusive presumption is wholly unlike the typical form of such analysis. *Carella v. California, 109 S.Ct. 2419, 2421 (1989) (Scalia, J., concurring opinion)*

The Court has disapproved the use of mandatory conclusive presumptions not merely because it conflicts with the overriding presumption of innocence with which the law endows the accused, but also because it invades the fact finding function which in a criminal case the law assigns solely to the jury. The constitutional right to a jury trial is fundamental, and a Defendant may insist upon observation of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.

The question for a reviewing Court is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards of the constitution. *Bollenbach v. United States,*

326 US 607, 614 (1946). Findings made by a Judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a Defendant resulting from the Court's failure to instruct it to find an element of the crime. *Cabbana v. Bullock*, 474 US 376, 384-375 (1986).

The rationale weighing against the standard harmless error analysis for *Sandstrom* type error is persuasive:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied on the presumption rather than upon the evidence. If the jury may have failed to consider evidence of intent, a reviewing Court can not hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method of which decisions of guilt are to be made. *Connecticut v. Johnson, 460 US at 85, 86 (1983) (Plurality Opinion)*

The majority of the Court in *Rose* focused on the truth determining function of the criminal trial declaring that "the central purpose of a criminal trial is to decide the factual question of a Defendant's guilt or innocence" *Rose at 577.*

This reasoning denigrates important constitutional protections afforded to a Defendant. By effectively treating constitutional rights as designed to promote only factual accuracy, the Court undermines those rights that promote values other than the reliability of guilty verdicts.

> The basic concept of Due Process is fair play. The test of our system of legal jurisprudence should be measured by the interest we take in safeguarding the fundamental rights of an accused. The Defendant is entitled to a fair determination of his guilt. Fair trials insure our concern with Due Process and contribute to what we believe is the proper administration of criminal justice. It is only in this way that we prevent the undermining and mockery of justice. *United States v. Rispo, 460 F.2d 965, 978, (3rd Cir. 1972).*

In Connecticut v. Johnson, 460 US 73, 87 (1983) a plurality of the Court determined that the use of conclusive presumptions could be harmless error only in those "rare situations" when the "reviewing court can be confident that the error did not play a role in jury's verdict". The opinion mentioned as among those "rare situations" an instructior establishing a conclusive presumption on a charge of which the Defendant was acquitted, and an instruction establishing a conclusive presumption with regard to an element of a crime that the Defendant in any case admitted. Neither of those situations apply in this case.

First, there is a significant difference between evidentiary errors and instructional errors. Unlike an isolated evidentiary error, it must be assumed that the jury followed the instruction it was given, therefore the Court must find, as a matter of law, that the defective instruction was followed and necessarily had an impact on the jury.

Even if it was possible for the Court to determine the impact of the instruction on the jury, it is inescapable that the erroneous jury instruction unconstitutionally skewed the jury's perception of the evidence. Since the Defendant possessed items stolen from the victim, and since common

sense dictates that the person who committed the theft also committed the burglary and rape, any evidence linking the Defendant to the theft would be critical. Here, the jury was relieved from finding that Lamborn committed the criminal offenses because the jury was instructed by the Court to presume he was the offender. In light of the circumstantial evidence in this case, it is unreasonable to argue that the instruction was harmless beyond a reasonable doubt.

There was substantial evidence which viewed in a light favorable to the Defendant supports a reasonable doubt. The victim did not identify Lamborn as her assailant, in fact, she was unsure of the offender's race. There is evidence that she believed him to be black. Fingerprints at the crime scene and stolen car were taken with negative results. Hair fibers from the shower catch drain shared characteristics with Lamborn's hair and could have originated from him, but the FBI agent admitted that shared similarities are not conclusive on the question of identity.

In sum, in applying the standard harmless error analysis, a Court is faced with the formidable task of determining if the jury followed the instruction that was given. If the jury followed the instruction, then they presumed that Lamborn committed the offenses because he possessed the proceeds of the crimes, therefore it is clear that the error contributed to the verdict. There is no reasonable evidence to support a finding that the jury ignored the erroneous jury instruction and reached its verdict in an acceptable manner, therefore, Lamborn's convictions should be reversed.

CONCLUSION

To answer the question left open by the Lamborn Court as to whether a defective jury instruction containing a mandatory conclusive presumption can ever be harmless error, the Petitioner submits the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A.

IN THE
SUPREME COURT OF THE STATE
OF DELAWARE

JOHN LAMBORN,	§	
	§	
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	No. 100, 1989
	§	
STATE OF DELAWARE,	§	Court Below: Superior Court
	§	of the State of Delaware in
	§	and for New Castle County
Plaintiff Below,	§	in Cr.A. Nos. IN80-01-0815
Appellee.	§	and IN80-01-0816.

Submitted: February 6, 1990
Decided: February 20, 1990

Before HORSEY, MOORE AND WALSH, Justices.

ORDER

This 20th day of February, 1990, the Court having heard oral argument and considered the briefs of counsel, and it appearing that:

1) On August 31, 1988, the Superior Court granted the defendant's post-conviction motion for a new trial. *State v. Lamborn*, Del. Super., Cr.A. Nos. IN80-01-0815 and 0816 (Poppiti, J.) (Aug. 31, 1988) (ORDER) ("*Lamborn I*"). The parties had all conceded that a jury instruction given at defendant's trial[1] was unconstitutional under *Sandstrom v. Montana*, 442 U.S. 510 (1979) and subsequent holdings of the Delaware Supreme Court construing *Sandstrom*. *See Hall v. State*, Del. Supr., 473 A.2d 352 (1984); *Craig v. State*, Del. Supr., 457 A.2d 755 (1983); *Plass v. State*, Del. Supr., 457 A.2d 362 (1983).

2) Although no contemporaneous objection to the error was made, the Court found cause and actual prejudice to exist. *See Conyers v. State*, Del. Supr., 422 A.2d 345 (1980) (requiring showing of cause and actual prejudice to overcome failure to object at trial). According to the

---

[1]The instruction was as follows:

There is a statute in this state that may have some bearing on this case if you make the requisite findings. I'll read to you some brief portions of the statute. A person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committted the crime. The Court may tell the jury of the existence of the presumption, and if it does so, the defendant is entitled to a jury instruction that the presumption does not relieve the State of its burden of proving guilt beyond a reasonable doubt. Nevertheless, the jury may convict the defendant despite the existence of evidence tending to rebut the presumption if they find no reasonable doubt about the defendant's guilt.

Court, cause existed because the legal predicate for the defendant's position did not arise until *Hall, Craig* and *Plass*. Furthermore, in finding actual prejudice the Court relied entirely on *Hall, see Lamborn I*, slip op. at 5-6, a case held to be factually controlling.

3) The State filed a motion for reargument pursuant to Superior Court Criminal Rule (57(b) on September 21, 1988, arguing that no prejudice existed. The State contended that the reasoning in *Hall* had been undercut by *Rose v. Clark*, 478 U.S. 570 (1986). The Court ultimately issued a new order denying the post-conviction application for a new trial. *State v. Lamborn*, Del. Super., Cr.A. Nos. IN-80-01-0815 and 0816, (Poppiti, J.) (Feb. 8, 1989) (ORDER) ("Lamborn II"). Defendant appeals the decision in *Lamborn II*.

4) The standard and scope of review is whether the trial court erred as a matter of law.

5) the parties are in sharp disagreement over the precise issue before us. The problem arises from a rather inarticulate disposition of the matter in *Lamborn I*. In *Lamborn I* the trial judge found "cause" and "actual prejudice" arising out of the *Sandstrom* error. However, in *Lamborn II* he found this error to be harmless based on the reasoning of the Supreme Court in *Rose*.

6) Lamborn argues that the trial judge misinterpreted *Rose* and applied the wrong harmless error standard. The test that should have been applied, according to Lamborn's interpretation of *Rose*, was whether there was a "reasonable possibility that the evidence complained of might have contributed to the conviction," *Chapman v. California*, 386 U.S. 18, 24 (1967), rather than whether defendant's guilt was established beyond a reasonable doubt.

7) The State argues in response that Lamborn's harmless error argument misses the point. They claim that the trial judge found that Lamborn failed to meet the cause and actual prejudice standard. However, the Court clearly found just the opposite in *Lamborn I* and did not explicitly reject this rationale in *Lamborn II*. Rather, in *Lamborn II* the Court simply held that error to have been harmless.

8) In our opinion the trial judge was correct in applying the cause and actual prejudice test in *Lamborn I*. *See Conyers v. State*, Del. Supr., 422 A.2d 345, 346 (1980). Although we encountered difficulty reconciling *Lamborn I & II*, it is apparent that the harmless error in *Lamborn II* implicitly rejected the earlier finding of actual prejudice in *Lamborn I*. Unfortunately, the trial judge did not explain why *Hall*, which he relied on in *Lamborn I*, no longer controlled the analysis. Although the State did not point this out, in our opinion *Hall* is not controlling because it did not involve a post-conviction proceeding. In *Lamborn I & II* the trial judge was trying to determine if there was *actual prejudice*. If the error was harmless, there could not have been actual prejudice. *See Conyers*, 422 A.2d at 346 (no actual prejudice if there was "no reasonable probability that the jury would have reached a different verdict.") Moreover, the Court correctly applied the harmless error standard in *Rose*. *Rose*, 478 U.S. at 583 (standard is whether, based on the entire record, the error was harmless beyond a reasonable doubt). The judge found that the constitutional error as measured against the entire record was harmless beyond a reasonable doubt because the defendant's guilt was established beyond a reasonable doubt. *Lamborn II*, slip op. at 3. In other words, the evidence of guilt was such that there was no reasonable doubt that the jury would have found it unnecessary to rely on the instruction. This is exactly

what *Rose* requires. *Rose*, 478 U.S. at 583. Furthermore, this is consistent with *Conyers*.

9) In finding harmless error, the trial judge did not abuse his discretion. The evidence against the defendant was overwhelming. The facts are these:

On April 18, 1989, John Lamborn ("Lamborn") was staying on the living room couch of a friend, Rhonda Willis. At 5:00 a.m. the next morning a woman was brutally raped 8 miles from the house in which Lamborn was staying. Various items of jewelry, coins and the victim's notary seal were stolen by the rapist.

Later that morning, Lamborn showed Willis and a friend several pieces of jewelry that he described as "hot" and borrowed Willis' car to go to Philadelphia to sell the jewelry. Later, on that same day, April 19, police searched Willis' house pursuant to a search warrant (completely unrelated to Lamborn). Underneath the seat of the chair near the couch on which Lamborn had slept the previous night they found jewelry, coins and the rape victim's notary seal. When Lamborn returned in Willis' car, a brown ski mask was found in the car (matching the description of the mask worn by the rapist). In addition more jewelry was found in a sack in the car, and a fraternity pin bearing the initials of the victim's ex-husband was found in Lamborn's possession.

Two pubic hairs matching Lamborn's hair were found in the bathtub drain where the rapist had forced his victim to take a shower.

Lamborn initially claimed that another man, Kevin Petterson, had given him the victim's property, however, upon learning that Peterson, a man with an artificial arm, had been incarcerated during April of 1979, he retracted this story.

10) On May 10, 1980 Lamborn was convicted by a jury on First Degree Rape, First Degree Burglary and Felony Theft. This Court affirmed the convictions on appeal. *Lamborn v. State*, Del. Supr., Nos. 124 and 175, 1980, McNeilly, J. (Aug. 14, 1981) (ORDER) (addressing issues relating to validity of search warrant and propriety of police search of Lamborn himself).

11) In our opinion the *Sandstrom* error was harmless under these circumstances. Lamborn has failed to establish "actual prejudice" as required by *Conyers*. Accordingly the judgment of the Superior Court must be affirmed.

12) In so ruling, we have fully considered the procedural issue raised by defendant. The order in *Lamborn* was entered on August 31, 1988. The defendant received his copy on September 2, but the State claims not to have received its copy until September 12. The State immediately called the trial judge to request reargument, and the judge ordered the State to file a written motion on or before September 26. The State's motion for reargument was filed on Septembe 21, 1988.

13) The defendant's argument can be easily summarized:

> (a) Superior Court Criminal Rule 57(b) incorporates the procedural rules applicable to civil cases in situations not specifically prescribed by the criminal rules;
>
> (b) The criminal rules do not provide for reargument motions so that Criminal Rule 57(b) adopts Superior Court Civil Rule 59(e) to govern such requests;
>
> (c) Rule 59(e) creates a five day jurisdictional time limit, after the entry of an order, for the filing and service of a motion for reargument;

(d) The time limits in Rule 59(e) cannot be extended;

(e) The State's motion, even if deemed filed on September 12 was untimely under Rule 59(e) to allow reconsideration of the new trial order in *Lamborn I* entered August 31, 1989. Thus, the Superior Court lacked jurisdiction to vacate its order in *Lamborn I*.

14) The State argues, in response, that the new trial order in *Lamborn I* was not appealable and the motion for reargument was therefore not subject to the time limits in Civil Rule 59(e). This is so, according to the State, because the short time requirements in Rule 59(e) assure that there will not be undue delay in the appeal process, and therefore, because no right of appeal lies, there was no need for the trial judge to apply the time limits in Rule 59(e). The State cites numerous cases purporting to support this rationale. Further, the State argues that even if *Lamborn I* were appealable, Rule 59(e) was still not applicable because there is no exception to the jurisdictional requirements for reargument of interlocutory orders.

15) Lamborn argues that the plain language of Supreme Court Rule 6(3) contemplates appeals of post-conviction relief orders. Rule 6(3) states that the time for taking appeal is "within 30 days after entry upon the docket of a judgment or order *in any proceeding for post-conviction relief.*" (emphasis added).

16) Unfortunately, neither party adequately addresses the trial judge's basis for his decision. He refused to apply Civil rule 59(e) because Criminal Rule 57 did not, as he read it, *require* him to apply 59(e)'s time requirements. He said that although the State claimed to bring the motion under 59(e), he would treat it as if it was brought only

under Criminal Rule 57 pursuant to which he had broad discretion. A critical question thus becomes, does Criminal Rule 57 *require* the trial judge to apply Civil Rule 59(e)? On its face, it appears that it does not. Rule 57 uses permissive language: "If no procedure is specifically prescribed by rule, the Court *may* proceed in accordance with the corresponding Superior Court Civil Rule or in any lawful manner not inconsistent with these rules, with the rules of the Supreme Court, or any applicable statute." Super. Ct. Crim. R. 57 (1988 supp.) (emphasis added).

17) Lamborn has not presented a compelling argument that Rule 57 requires the trial judge to apply the time requirements of Rule 59. The State should not be penalized under these circumstances. The trial judge properly exercised his discretion under Rule 57 by not applying the time requirements of Rule 59(e).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

Justice Andrew O. Moore

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STATE OF DELAWARE,
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SUPPLEMENTAL APPENDIX

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SUPREME COURT, U.S.

IN THE
SUPERIOR COURT OF THE STATE
OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	CRIMINAL ACTION
	)	NUMBER
JOHN STEPHEN	)	IN-80-01-0815
LAMBORN,	)	IN-80-01-0816
	)	
Defendant	)	

ORDER

Submitted: August 11, 1988
Decided: August 31, 1988

On Defendant's Motion for Post-Conviction Relief Pursuant to Superior Court Criminal Rule 35—GRANTED

Timothy H. Barron, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware

Larry W. Fifer, Esq., of Schmittinger & Rodriquez, P.A., Rehoboth Beach, Delaware, for defendant

This 31st day of August, 1988:

Upon consideration of the record before the Court and the contentions of the parties contained in the submitted briefs, it appears to the Court that:

1. John Stephen Lamborn, defendant, was charged with first degree rape, first degree burglary and felony theft. His defense at trial was alibi, although neither he nor any other defense witness was called to testify.

At the close of all the evidence, the Court instructed the jury on felony theft. In the course of the Court's instruction, the following charge was given:

> There is a statute in this state[1] that may have some bearing in this case if you make the requisite findings. I'll read to you some brief portions of the statute. A person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committed the crime. The Court may tell the jury of the existence of presumption, and if it does so, the defendant is entitled to a jury instruction that the presumption does not relieve the State of its burden of proving guilt beyond a reasonable doubt. Nevertheless, the jury may convict the defendant despite the existence of evidence tending to rebut the presumption if they find no reasonable doubt about the defendant's guilt.

Defendant's counsel made no objection to this instruction.

On March 10, 1980, the jury returned a guilty verdict and judgment was entered by the Court. The defendant's conviction was affirmed on appeal. *Lamborn v. State*

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[1] 11 *Del. C.* §306(c)(2)

Del.Supr., 450 A.2d 893 (1981) (Table).[2] Defendant now moves for relief pursuant to Super. Ct. Crim. R. 35(a)[3], contending, inter alia, that the Court's instruction concerning the possession of recently stolen items was constitutionally defective in light of the United States Supreme Court's holding in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and the subsequent holdings of the Delaware Supreme Court construing *Sandstrom* in *Hall v. State*, Del.Supr., 473 A.2d 352 (1984); *Craig v. State*, Del.Supr., 457 A.2d 755 (1983) and *Plass v. State*, Del.Supr., 457 A.2d 362 (1983). *In its supplemental answering brief, the State concedes,* based on the above authority, that the given instruction was constitutionally defective. I am satisfied that the question becomes: *Is the instruction fatal to the verdict, requiring that defendant's conviction be set aside? I am satisfied that the answer is in the affirmative.*

---

[2]The Delaware Supreme Court affirmed defendant's convictions in a consolidated appeal stemming from two separate trials and convictions. The first trial, with which this motion is concerned, was concluded on March 10, 1980, and resulted in a jury convicting defendant of rape first degree, burglary first degree and felony theft. The second trial concluded on April 30, 1980, with a jury convicting defendant of four counts of robbery first degree, three counts of possession of a deadly weapon by a person prohibited, two counts of possession of a deadly weapon during the commission of a felony and one count of unauthorized use of a motor vehicle. Defendant made only two arguments on appeal regarding his March 10 trial: that the Superior Court erred in denying his motion to suppress evidence, and that the police acted unlawfully in stopping and frisking him when he arrived at his house where a search warrant was being executed. The Supreme Court concluded that both arguments were without merit.

[3]Effective January 1, 1988, Rule 35 as supplanted by Superior Court Criminal Rule 61. This motion, however, was filed prior to the effective date of new Rule 61 and is, therefore, governed by the provisions of (old) Rule 35.

2. Generally, in a case where there is no contemporaneous objection to the event for which the defendant seeks postconviction relief, the defendant is barred from relief, Del. Super. Ct. Crim. R. 30(a). *See Flamer v. State*, Del.Supr., 227 A.2d 123 (1967); *Lane v. State*, Del.Supr., 222 A.2d 263 (1966); *Turner v. State*, Del.Supr., 137 A.2d 395 (1959), unless he can show cause for his failure to object at trial and actual prejudice resulting from the alleged constitutional violation. *Conyers v. State*, Del.-Supr., 422 A.2d 345 (1980); *State v. Carr*, Del.Super., IN-82-04-1688 through IN-82-04-1699, Taylor, J. (February 29, 1988) Order)[4].

3. In the matter *sub judice*, I am satisfied that since the legal predicate in support of the defendant's position that a jury instruction which fails to explain that a presumption is nothing more than a permissible inference is constitutionally defective did not arise until the holdings in *Plass, supra, Craig, supra,* and particularly *Hall, supra,* were announced some two to three years after defendant's trial, the defendant has demonstrated the requisite cause for his counsel's failure to object at trial.

4. I am equally satisfied that defendant has suffered actual prejudice as a result of the defective instruction. In *Hall v. State*, Del.Supr., 473 A.2d 362 (1984), on a factual record *nearly* identical to the one *sub judice*, the Delaware Supreme Court held that the term "presumption", where it is used in a criminal instruction, must be explained as an inference during the course of the jury charge. The Court in *Hall*, in evaluating the legal effect of using the term "presumption" in a §306(c)(2) charge, explained:

> In this charge the words "presumed" or "presumption" were used . . . and the word "inference" was never used, although "presumptions" of

this sort must be explained as inferences under recent case law. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The charge clearly indicates that if the possession is "explained to the satisfaction of the jury" the presumption "may be effectively rebutted." Most of the charge is a carefully worded charge on a rebuttable presumption and for many years a charge of this sort was deemed to meet constitutional standards. However, the charge does leave open the danger that it might be understood to shift the burden of proof to defendant because it fails to say that defendant has no duty to testify or to present evidence, and it does not specifically state that possession of recently stolen goods may be explained by evidence other than defendant's own testimony. The charge eventually goes on to explain that the presumption does not relieve the State of its burden of proving every element of the crime beyond a reasonable doubt, but such statement may itself have been difficult to apply correctly in view of the apparent significance of the presumption.

As was pointed out in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the effect of a presumption as explained in a jury instruction must be tested by the way a reasonable juror could have interpreted the charge and not by the interpretation which a court would place on the charge. Viewed in this light, the charge given in this case could well have been regarded by the jury as an instruction that one found in possession of recently stolen goods is presumed to be the thief unless he personally rebuts the presumption by an explanation which the jury finds to be satisfactory. Such an understanding would have been an incomplete understanding of the law as it now stands.

> At least since the decision in *Sandstrom v. Montana, supra,* it has been clear that a jury instruction such as this one on a rebuttable presumption does not meet constitutional requirements unless it is clearly explained that the presumption is actually no more than a permissible inference. The statute on which the "presumption" rests must also be read to refer to a presumption which has the characteristics of an inference if it is to be upheld in the face of constitutional challenges. The Delaware Model Charge 4H prepared in 1973 attempted to meet this requirement.
>
> Under the circumstances, the mere likelihood that the charge was misunderstood causes the charge to fall short of the constitutional requirements set forth in *Sandstrom v. Montana, supra.*
>
> The State does not attempt to defend the charge as given but, instead, it takes the position that any error in the charge was harmless since the only defense was alibi. We are of the opinion, however, that once the alibi defense was rejected by the jury, the focus had to be upon defendant's unexplained possession of recently stolen goods and a completely corrected charge on that issue was essential. Therefore, the conviction must be set aside and the case remanded for a new trial.

Hall, 473 A.2d at 355.

5. Having stated the above, I conclude that the analysis in *Hall* is controlling in this case. I also conclude that the instruction given here created the substantial likelihood that the jury misunderstood the nature of the presumption. As in *Hall,* the actual prejudice can be said to flow from the jury's obvious rejection of the alibi defense,

which then shifted the focus to defendant's failure to explain his possession of the recently stolen property. The failure to give a completely correct instruction on that issue was, therefore, fatal.

6. The conviction is set aside and the matter should be set for trial forthwith.

IT IS SO ORDERED.

VINCENT J. POPPITI, Judge

IN THE
SUPERIOR COURT OF THE STATE
OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action Numbers
	)	IN80-01-0815 and
JOHN STEPHEN	)	IN80-01-0816
LAMBORN,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Submitted: October 26, 1988
Decided: February 8, 1989

Upon reconsideration, Defendant's Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 35 is DENIED.

Timothy H. Barron, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Michael W. Modica, Esq., of Aerenson, Ferrara and Lyons, Wilmington, Delaware, for defendant.

This 8th day of February, 1989:

Upon Consideration of the record before the Court and the letter memoranda submitted by counsel, it appears to the Court that:

1. The matter is presently before the Court on the State of Delaware's Motion to reconsider my decision and order of August 31, 1988. *State* v. *Lamborn*, Del. Super., Crim. Nos. IN80-01-0815, 0816, Poppiti J. (Aug. 31, 1988).

2. I granted the defendant's Motion for Postconviction Relief on the basis that the Trial Court's instruction on the presumption arising from the possession of recently stolen goods was not constitutionally valid under the decision of the United States Supreme Court in *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). *See also Hall* v. *State*, Del Supr., 473 A.2d 352 (1984) (Instruction on rebuttable presumption arising from possession of recently stolen goods did not meet constitutional standards when the only evidence connecting defendant with the burglary and theft was defendant's appearance in a bank the day after the crimes with coins similar to those taken from the victim). The State now requests the Court to reconsider this decision pursuant to Superior Court Criminal Rule 57.[1]

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[1]Superior Court Criminal rule 57 states as follows:

> If no procedure is specifically prescribed by rule, the Court may proceed in accordance with the corresponding Superior Court Civil Rule or in any lawful manner not inconsistent with these Rules, with the Rules of the Supreme Court, or with any applicable statute.

Notwithstanding the defendant's argument that the State's Motion for Reconsideration is time barred, I am satisfied that I should not apply the time limitations of Superior Court Civil Rule 59(e) and therefore hold that it was timely filed.

3. The issue presented by this motion is whether the constitutionally defective jury instruction addressing the possession of recently stolen goods constitutes harmless error. In *Rose* v. *Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), a jury instruction that all homicides are presumed to be malicious was deemed to be subject to a harmless error analysis. *See also Delaware* v. *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (harmless error analysis applied to violation of the Confrontation Clause); *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d (1967) (comment by prosecutor on defendant's failure to testify at trial was not harmless error). The standard to be applied is whether that constitutional error as measured against the entire record was harmless beyond a reasonable doubt. *Rose, 478* U.S. at *583*. Moreover, a presumption of a fair trial exists when a case is tried by an impartial judge and jury:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Id. at 579.

4. Applying the harmless error standard to the facts of the present case, I am satisfied based on a review of the record marshalled by the parties that there is sufficient evidence to conclude that the defendant's guilt was established beyond a reasonable doubt.

In this regard the record reflects that an agent of the Federal Bureau of Investigation, expert in the science of hair and fiber comparisons, testified that two pubic hairs found by police after the incident in the victim's shower drain catch matched a pubic hair sample from the defendant, Lamborn. (TR A-96). This expert further testified that it is "very uncommon" for hairs from different individuals to exhibit the same microscopic characteristics. (TR A-96). Additionally, evidence was produced from which the jury could conclude that the defendant lied under oath during his preliminary hearing concerning how he acquired certain items of personal property consisting of jewelry and coins which were taken from the victim during the incident. (TR B-98, 99).

Although the victim could not describe the race of her attacker, she did describe him as being over six feet tall, weighing between 160 and 180 pounds and wearing a ski mask and gloves. This physical description accurately fits the defendant and the record further reflects that a ski mask which was taken from the defendant's car less than one day after the incident was similiar to the one worn by the assailant. (TR A-54, 55, 58).

Finally, the State contended that the defendant fled following the commission of the crime. The jury was properly charged that evidence of flight may tend to show guilt in relation with the other facts proven in the case. (Jury Charge (TR 15-16).

5. Having stated the above, I am satisfied that, although there was clear *Sandstrom* error in the jury instruction concerning recently stolen goods, the constitutional error was harmless error in the context of the entire record consistent with the holding in *Rose*. The defendant's Motion for Postconviction Relief upon reconsideration is therefore HEREBY DENIED.

IT IS SO ORDERED.

VINCENT J. POPPITI, Judge